

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2522 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE

&

HONOURABLE MS. JUSTICE R.M.DOSHIT

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
- =====

J K CORP. LTD. - Petitioner(s)

Versus

SALES - TAX OFFICER & 1 - Respondent(s)

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Appearance :

MR KH KAJI for Petitioner

MR VM PANCHOLI, AGP for Respondents

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MS. JUSTICE R.M.DOSHIT

Date : 26/12/2005

ORAL JUDGMENT (Per : HONOURABLE MS. JUSTICE R.M.DOSHIT)

The petitioner is a dealer within the meaning of the Gujarat Sales-tax Act, 1969 (hereinafter referred to as, "the Act"). In the present petition, preferred under

Article 226 of the Constitution of India, the petitioner has challenged the order dated 11th October, 2003 of attachment made under Section 48A of the Act and the notices for provisional assessment for the Assessment Years 2001-02 to 2003-04 issued under Section 41B of the Act.

The petitioner is a manufacturer of cement. The petitioner has its plant in the State of Rajasthan and branch offices all over India. The petitioner has a branch office in the State of Gujarat at Ahmedabad and storage godowns (known as dumps) located at several places in the State of Gujarat. It is the claim of the petitioner that petitioner brings cement in the State of Gujarat by branch transfer and stores the same at various dumps in the State of Gujarat. The petitioner sells the cement to its buyers in the State of Gujarat at the ex-dump price i.e. the delivery of the stock is effected at the dump. The stock thereafter is transported to the buyer at the cost and risk of the buyer. In case the buyer has no facility of transport, the petitioner arranges such transport on behalf of the buyer. The freight paid to the transporter is collected from the buyer. Transport charge is indicated in a separate debit

note and is entered into the account of the buyer. In other words, the transport charges are borne by the buyer. On 11th October, 2003 the respondents authorities carried out a search at the office and godowns of the petitioner. In view of the information collected at such search, the respondents authorities have issued *impugned* order of attachment of the goods and have also issued *impugned* show-cause notices for provisional assessment. According to the respondents authorities the freight paid by the petitioner on behalf of the buyers represents part of sale price charged by the petitioner. The said amount is, therefore, a taxable turnover liable to levy of tax under the Act. However, the petitioner has avoided payment of tax on such amount by issuing separate debit notes. The amount of freight collected by the petitioner has thus escaped the sales-tax leviable under the Act.

Mr.Kaji has submitted that the petitioner has issued its pricing policy to all its branch offices. The said pricing policy clearly indicates that the cement is sold to the dealers and direct consumers at ex-dump price. The delivery is effected at the dump site. After receiving delivery at the dump site the cement is transported to its destination at the cost and risk of the buyer. He has

relied upon the averments made in the petition and has submitted that in cases where the delivery is effected at the place of the buyer, the sale price includes the freight. The petitioner in that case pays sales-tax over the sale price which includes the transport charges. However, in cases where the stock is sold at the dump the freight is borne by the buyer. However, in the event the buyer has no facility to transport the stock, the petitioner makes arrangement to transport the stock to the place of the buyer at the cost and risk of the buyer. In such case, the charges paid to the transporter is recovered from the buyer. Such transport charges not being part of the sale price is not liable to the tax under the Act. He has submitted that of the total sale only 28% of the sale is effected at the dump where transport charges are required to be recovered from the buyer. The dispute has arose in respect of the said 28% of the sale alone.

Mr.Kaji has also submitted that the action of the respondents authorities taken under Section 41B of the Act was uncalled for, unwarranted and illegal. He has submitted that Section 41B of the Act envisages an action of provisional assessment in the event the Commissioner

has reason to believe that the dealer has evaded the tax. In the submission of Mr.Kaji "*evasion of tax*" and "*formation of opinion by the Commissioner*" are two prerequisites for initiation of any action under Section 41B of the Act. In the present case, the petitioner cannot be said to have evaded payment of tax. The amount of freight recovered by the petitioner under separate debit notes was not a taxable turnover in the hands of the petitioner. The petitioner was, therefore, not liable to pay tax over the said amount. The petitioner, therefore, could not have been alleged to have evaded payment of tax. The *impugned* notices issued under Section 41B of the Act are, therefore, *void-ab-initio* and require to be quashed and set-aside. Consequently, the order of provisional attachment made under Section 48A of the Act is equally erroneous and illegal.

In support of his submissions, Mr.Kaji has relied upon the judgments of the *Hon'ble* Supreme Court in the matters of **Hindustan Sugar Mills Ltd. v/s. State of Rajasthan & Ors.**[(1979) 43 S.T.C. 13]; of **State of Karnataka and another v/s. Bangalore Soft Drinks Pvt. Ltd.** [(2000) 117 S.T.C. 413; of this Court in the matter of **Batliboi & Co. Ltd. v/s. Sales Tax Officer (I), Class-**

1, Division 1, Surat and others [(2000) 119 S.T.C. 583]
and of Karnataka High Court in the matter of **Narayani Rao v/s. Commissioner of Commercial Taxes in Karnataka, Bangalore and another [(1994) 93 S.T.C. 247]**.

The petition is contested by Mr.Pancholi. He has submitted that in view of passage of time the challenge to the order of provisional attachment shall not survive. Besides, the petitioner has availed of the alternative remedy of statutory appeal against the said order. The present petition preferred under *Article 226* of the Constitution of India is, not maintainable. He has next submitted that until an order of provisional assessment is made the petition preferred against the show-cause notice issued under Section 41B of the Act is premature and requires to be rejected on that ground also. Further, any order of provisional assessment made under Section 41B shall be appealable. He has submitted that in any view of the matter the petition involves disputed questions of facts. Therefore also, the petition requires to be dismissed. He has submitted that as indicated in the *impugned* show-cause notice the freight is collected by the petitioner from its buyers under separate debit notes with a view to avoiding the liability to pay sales-

tax on the amount of freight charged by the petitioner. The petitioner sells the cement at a price lower than the purchase price. Thus, it is clear that the invoices do not reflect real price of the cement charged by the petitioner. Issuance of a separate debit note is nothing but a device evolved by the petitioner to avoid the liability to pay tax over a part of the sale price of cement. To this, Mr.Kaji has answered that the price of the cement shall depend upon the market conditions. He has submitted that the cement is perishable. The petitioner has, therefore, to adapt to market conditions and may have to clear its stock even at a loss.

Mr.Pancholi has also relied upon the meaning of the words "*sale price*". He has submitted that Section 2(29) of the Act defines 'sale price' as "***the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation when such cost is separately charged and includes,...***". He has emphasized upon the words "*anything done by the dealer in respect of the goods at the time of or before delivery thereof*"

occurring in the above definition and has submitted that the above words are of wide amplitude and would include the transport charges paid by a dealer, may be on behalf of the buyer.

In support of his arguments Mr.Pancholi has relied upon the judgments in the matters of **Laxmi Cement Distributors Pvt. Ltd. v/s. Sales Tax Officer (2), Jamnagar and others** [(1998) 110 S.T.C. 188]; of **Black Diamond Beverages and another v/s. Commercial Tax Officer, Central Section, Assessment Wing, Calcutta and others** [(1997) 107 S.T.C. 219]; of **Ramco Cement Distribution Co. Pvt. Ltd. v/s. State of Tamil Nadu** [(1993) 88 S.T.C. 151]; and of **Hindustan Sugar Mills Ltd. v/s. State of Rajasthan and others** [(1979) 43 S.T.C. 13].

Sections 41B and 48A of the Act have been inserted in the Act with effect from 1st August, 1998 by Gujarat Act No.13 of 1998. The said sections read as under :-

Section 41B. Provisional Assessment.

- 1.Where the **Commissioner** has reason to believe that the dealer has evaded the tax, he may, after taking into account all relevant materials

gathered by him and after giving the dealer a reasonable opportunity of being heard, provisionally assess to the best of his judgment the amount of tax payable by the dealer.

2. The provisions of this Act shall *mutatis mutandis* apply to the provisional assessment as if provisional assessment were an assessment made under this Act.

Section 48A. Provisional attachment to protect revenue.

1. Where during the pendency of any proceedings of provisional assessment or assessment of tax or reassessment of turnover escaping assessment, the **Commissioner** is of the opinion that for the purpose of protecting the interest of the revenue, it is necessary so to do, he may by order in writing attach provisionally any property belonging to the dealer in such manner as may be prescribed.

2. Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under sub-section (1): Provided that the **Commissioner**

may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit so however that the total period shall not in any case exceed one year.

Undoubtedly, Section 41B of the Act envisages formation of opinion by the Commissioner with respect to the dealer having evaded the tax. Thus, for any action taken under Section 41B of the Act, the formation of opinion by the Commissioner that the dealer has evaded the tax is a prerequisite and a *sine qua non*. In the present case, the *impugned* notices are self-explanatory. They do refer to the formation of opinion that the petitioner had evaded tax. Hence, in our opinion, before initiating action under Section 41B of the Act, the aforesaid prerequisite of formation of opinion was existing. It is true that the petitioner did pay the transport charges which were reflected in separate debit notes. But, whether such transport charges were genuine or not or, whether it was a device evolved by the petitioner to avoid payment of tax on the amount of the said charges or, whether the petitioner had manipulated the sale price so as to avoid payment of tax on part of the sale price recovered by the

petitioner are the matters of facts. It, therefore, cannot be said that the aforesaid debit notes reflect the amount of freight alone and that the said amount was not part of the sale price. We, therefore, do not agree that on the above referred facts the respondents authorities had no right to initiate action under Section 41B of the Act. We are also unable to countenance the contention raised by Mr.Pancholi. The action on the part of the dealer in transporting the goods to its buyers, in our opinion, would not amount to "*anything done to the goods*".

We do agree with Mr. Kaji. The *Hon'ble* Supreme Court has indeed made a distinction with respect to the amount of freight. In certain circumstances, the amount of freight charged by the seller is treated as part of the taxable turnover and is subjected to tax under the Act. While in the circumstances where the delivery of goods is completed at the place of the seller, the freight is borne by the purchaser, the amount of freight does not form part of the sale price; in such cases the amount of freight shall not form part of the taxable turnover. In that case such amount shall not be exigible to tax under the Act. However, as recorded hereinabove, there is a

serious dispute raised by the respondents authorities in connection with the claim made by the petitioner. According to the respondents authorities, the sale price charged by the petitioner does not reflect the true value; part of the sale price is recovered by separate debit note in form of freight. Besides, though called upon, the petitioner did not produce the relevant record before the respondents authorities. Unless the entire record is examined it cannot be said that the freight is borne by the purchaser as alleged. The claim of the petitioner cannot be accepted on basis of couple of invoices or debit notes produced before this Court. In our opinion, the matter raises disputed questions of facts which go to the root of the matter. The claim made by the petitioner in the present petition preferred under *Article 226* of the Constitution of India, therefore, cannot be decided without reference to the entire record. We do not consider it expedient to exercise our power of judicial review under *Article 226* of the Constitution of India to restrain the respondents authorities from proceeding further with the provisional assessment. The respondents authorities shall complete the provisional assessment as expeditiously as possible. The petitioner shall cooperate and furnish records and all necessary

details to the respondents authorities.

In view of the passage of time, the challenge to the order of provisional attachment shall not survive.

In view of the above discussion, the petition is dismissed with cost. Rule is discharged.

(Anil R.Dave, J.)

(Ms. R.M.Doshit, J.)

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